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No. 85-1433

In the Supreme Court of the United States

OCTOBER TERM, 1986

GLORIA RICHARDSON, WARDEN, PETITIONER

v.

CLARISSA MARSH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Confrontation Clause of the Sixth Amendment precludes the admission in a joint trial of the confession of a non-testifying co-defendant, where that confession, after redaction, does not name or otherwise identify the complaining defendant as a participant in the crime.

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INTEREST OF THE UNITED STATES

The issue in this case is whether, under *Bruton* v. *United States*, 391 U.S. 123 (1968), a court may admit at a joint trial the confession of a non-testifying co-defendant, if the confession does not name or otherwise identify the complaining defendant as a participant in the crime. The court of appeals in this case construed *Bruton* quite broadly. It held that a co-defendant's confession may not be admitted at a joint trial if the confession is damaging to the complaining defendant when considered in light of all the other evidence in the case. Finding the confession in this case to be sufficiently inculpatory under that standard, the court of appeals held that the trial court's limiting instructions could not be trusted to prevent the jury from considering the confession against respondent.

The proper application of *Bruton* is an issue presented almost daily in federal criminal trials. In light of the increasing number of multi-defendant prosecutions involv-

ing one or more post-arrest statements, the Court's analysis and resolution of this issue is likely to have a substantial effect on federal criminal practice.

STATEMENT

1. In the evening hours of October 29, 1978, respondent and her boyfriend, Kareem Martin, went to the Detroit home of Ms. Ollie Scott, whom respondent knew from their work in a numbers racket (Pet. App. 16a-17a; Tr. 338-340). When they arrived, the met Cynthia Knighton (Ms. Scott's niece) and Ms. Knighton's four-year-old son Koran (Pet. App. 16a-17a; Tr. 155-157). After a brief conversation, respondent rose from the living room couch and announced that she had come over "to pick something up" from Ms. Scott. Martin then drew a gun and pointed it at Ms. Scott and the Knightons (Pet. App. 17a; Tr. 161-162).

Respondent immediately walked to the front door and began to "look[] out the peephole" (Pet. App. 17a; Tr. 164). Just then the doorbell rang, and respondent opened the door to allow co-defendant Benjamin Williams to enter. He, too, drew a gun, and exclaimed as he passed respondent, "[w]here's the money?" (Pet. App. 17a; Tr. 165-167).

Martin then forced Ms. Scott upstairs, while Williams patrolled the kitchen and respondent remained posted at the front door. With Martin and Williams temporarily out of her way, Ms. Knighton took her son and attempted to flee. Respondent prevented her escape, however, by grabbing her around the shoulders and holding her until Williams ran back into the living room. At that time, Williams ordered the Knightons to lie down on the floor. Pet. App. 17a-18a; Tr. 167-170, 231.

Williams then went upstairs to assist Martin in ransacking the house; respondent remained downstairs with the Knightons and continued to "look out the peephole every now and then" (Pet. App. 18a; Tr. 171-172). Within min-

utes, the two men returned with Ms. Scott. Martin was carrying a grocery bag, which he handed to respondent. Pet. App. 18a, 27a; Tr. 172-174.

Martin then forced Ms. Scott down to the basement; Williams took the Knightons there as well (Pet. App. 18a; Tr. 177-178). Respondent, who was close by, continued to peer through the front door (Tr. 178). In the basement, Ms. Scott was ordered to lie on the floor, while Ms. Knighton and her son knelt in a nearby corner (Tr. 179-181). Martin then fired two shots at Ms. Scott from a distance of one to two inches, striking her in the head and killing her (Pet. App. 18a; Tr. 117, 184). Next, holding a blanket in front of his gun, Martin fired three shots at the Knightons from point blank range (Pet. App. 18a; Tr. 113-115, 184-186, 209). Koran Knighton was killed by a gunshot wound to the neck. His mother was badly wounded, but managed to summon the police. Pet. App. 18a; Tr. 113-116, 186-189.

2. Respondent and Williams were tried jointly.[1] During its direct case, the government offered against Williams a confession he had given to the police following his arrest (Pet. App. 18a; Tr. 288-290). As redacted, the only significant portion of the confession for present purposes was its recitation that on the way to Ms. Scott's house Martin had told Williams that "he would have to take [the victims] out after the robbery" (Pet. App. 19a; Tr. 289). The balance of the redacted confession was essentially cumulative of Ms. Knighton's testimony. The redacted confession made no mention of respondent at all, nor even that a third confederate, apart from Williams and Martin, had participated in the crime.[2]

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[1] Martin was a fugitive at the time of trial (Tr. 254).

[2] Williams' confession had originally inculpated respondent directly, making clear that respondent had participated in the conversation en route to Ms. Scott's house during which Martin had said that he would have to "take out" their robbery victims (Tr. 261-262, 267-269). Before

Respondent's attorney objected to the admission of the redacted confession against Williams in the joint trial. Relying on this Court's decision in *Bruton* v. *United States*, 391 U.S. 123 (1968), he argued that Williams was not planning to testify at trial, and that "there are certain inferences that are raised by this statement even in its altered form that would tend to incriminate" respondent (Pet. App. 18a; Tr. 260-261). After reviewing the legal authority cited by the parties, the trial court concluded that "the deletions are extensive as compared to the original statement, and any mention whatsoever of [respondent] does not appear in the amended statement. Therefore, this statement will be allowed to be read to the Jury" (Pet. App. 18a-19a; Tr. 270). The court instructed the government not to elicit anything that had been deleted from the statement, and the government took precautions to see that only the redacted version was placed before the jury (Tr. 270-271).

The government thereafter offered the redacted confession into evidence (Pet. App. 19a-20a; Tr. 288-290). As soon as the statement was admitted, the trial court gave the jury the following limiting instruction (Pet. App. 20a-21a; Tr. 292):

> The statement of Co-Defendant Williams has been admitted into evidence against him only. I caution you that it may be used in considering only the guilt or innocence of Defendant Benjamin Williams.

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the confession was admitted at trial, government and defense counsel met and, together, redacted the confession to eliminate all references to respondent. Respondent's attorney reserved the right to object to the admission of the confession, even as redacted. Government counsel had initially preferred simply to substitute the letter "A" for each reference to respondent in the confession. In deference to defense counsel's views, the prosecutor agreed to delete the references to respondent altogether, so that the redacted statement did not even reflect that there was a third participant in the crime. Tr. 263-266.

> Under the rules already given to you, it must not be used or considered in any way against Defendant Clarissa Marsh. To do so would be most unfair and in violation of the oath that you took as Jurors.[3]

After the government rested, respondent took the stand. For the most part, respondent corroborated the case against her: she testified that she had gone to Ms. Scott's house to get money to buy narcotics for Martin; that, once there, "Kareem had pulled a gun out"; that she had opened the door for Williams; that she had grabbed Ms. Knighton when she tried to escape; and that she had received a bag from Martin after he and Williams had come downstairs with Ms. Scott. Pet. App. 21a-22a; Tr. 307-329. In one respect, however, respondent supplemented the government's case against her: answering a question posed by her own attorney, respondent reported that she had been present during the drive to Ms. Scott's house and that she "knew that [Martin and Williams] were talking." She insisted, however, that she had been "sitting in the back and that the radio was on [and that she did not know] what they were talking about." Pet. App. 22a; Tr. 322.

At the outset of his summation the prosecutor reminded the jury that "it's important to consider the evidence separately against each Defendant. And because the evidence must be considered separately, in fairness to each of the Defendants, I would like to argue separately." Tr. 438. The prosecutor began, therefore, by reviewing the evidence against Williams, including the details of Williams' confession (Tr. 443, 446-447). When he turned

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[3] The trial court repeated that instruction immediately before the jury began its deliberations (Jury Charge Tr. 10).

to the evidence against respondent, the prosecutor made clear that the jury should not consider Williams' confession in its deliberations on the case against her (Pet. App. 23a; Tr. 448):

> [Respondent's] guilt, of course, is to be determined separately from the evidence, but you may consider the same evidence that you heard from the witness stand. The only thing that the Court will instruct you that you cannot consider is that statement that was made by the Defendant Williams. You cannot consider that statement when you determine her guilt or innocence. To do so would be unfair. The Court instructed you on that.

The prosecutor then reviewed the evidence against respondent, arguing that it showed her to have been a "lookout" and an active participant in the crime (Tr. 450-451). He also contended that respondent's testimony at trial had been designed simply "to clear herself of this crime" (*id.* at 450). In that connection, the prosecutor analyzed respondent's testimony, in which she had admitted being in the car with Williams and Martin during the drive to Ms. Scott's house but denied having heard any discussion about committing a robbery (Pet. App. 24a; Tr. 452):

> Why did she say that? Why did she say she couldn't hear any conversation? * * * Because if she admits that she heard the conversation and she admits to the plan, she's guilty of at least armed robbery. So she can't tell you that.

Respondent and Williams were convicted on two counts of felony murder and a third count of assault with intent to kill (*id.* at 16a, 24a; Jury Charge Tr. 41-42). The trial court sentenced both defendants to life imprisonment on the felony murder counts and 60 to 90 years' imprisonment on the assault charge (*id.* at 24a-25a; Sentencing Tr. 3, 5).

The Michigan Court of Appeals subsequently affirmed respondent's convictions, and the Michigan Supreme Court denied her application for leave to appeal (Pet. App. 25a-27a).

3. In 1983, respondent filed a petition for a writ of habeas corpus, alleging that the admission of Williams' confession—even with limiting instructions—had violated her Confrontation Clause rights under *Bruton* (Pet. App. 27a).[4] Respondent contended that she was inculpated by Williams' admission that he and Martin had discussed the prospect of having to kill their robbery victims, even though the redacted statement did not identify her as a participant in that conversation. She reasoned that the statement, when considered in light of her own testimony placing herself in the car with Martin and Williams, constituted "powerful" evidence of her intent to commit murder (*id.* at 5a). The district court denied the petition (*id.* at 2a-14a). Holding that *Bruton* applies only to statements that, standing alone, are "powerfully incriminat[ing to] the criminal defendant" (*id.* at 7a), the court refused to extend *Bruton* to a co-defendant's statement of the kind involved in this case, in which the incriminating nature of the statement depends on the jury's linking it with other evidence presented at the trial (*id.* at 6a).

The court of appeals reversed (Pet. App. 15a-67a). While recognizing "the strong presumption that jurors can follow the court's instructions" (*id.* at 34a), the court nevertheless concluded that Williams' confession, "in the context of the evidence in this case, * * * was powerfully incriminating to [respondent] with respect to the critical

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[4] Respondent also challenged the sufficiency of the evidence against her (Pet. App. 27a). The district court rejected this claim (*id.* at 8a-14a), and the court of appeals, in light of its disposition of respondent's *Bruton* claim, did not reach the issue (*id.* at 57a n.1).

element of intent" (*id.* at 52a). The court acknowledged that Williams' statement on its face did not incriminate respondent, but it concluded that the confession must be considered together with respondent's testimony placing herself in the car where, according to Williams' statement, the robbery and murder were discussed (*id.* at 51a).

The court conceded that most courts have refused to apply *Bruton* to statements that do not, on their face, identify another defendant as a participant in the crime (Pet. App. 47a-49a & n.9). Nonetheless, the court concluded that it was required to look beyond the face of the statement to discern its true "inculpatory value" (*id.* at 50a). The court was also moved by what it believed to be the prosecutor's use, in closing argument, of the "impermissible linkage" between the confession and respondent's testimony (*id.* at 52a). In short, the court of appeals held that the admission of Williams' statement in the joint trial "created a substantial risk that the jury would consider Williams' statement in their deliberations regarding [respondent's] guilt" (*id.* at 52a-53a). The court therefore directed the district court to grant the petition for a writ of habeas corpus (*id.* at 56).

SUMMARY OF ARGUMENT

Juries are ordinarily expected to follow a trial court's instructions about how to consider evidence admitted at trial. Our system of trials presumes that well-crafted instructions are sufficient—that juries understand them and obey them. In *Bruton* v. *United States*, 391 U.S. 123 (1968), this Court identified a narrow exception to that premise, holding that "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored" (391 U.S. at 135). In particular, the Court held, limiting instructions will not

suffice "where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial" (*id.* at 135-136).

Purporting to follow *Bruton*, the court of appeals held that it was improper for the trial court to admit Williams' statement at the joint trial. Although the statement, as redacted, did not identify respondent in any way, the court nevertheless held that it was "powerfully incriminating" and therefore violated respondent's Confrontation Clause rights, despite clear instructions to the jury not to consider the statement against respondent. Pet. App. 52a-53a. In so doing, the court of appeals gave *Bruton* a meaning this Court never intended it to have.

Bruton was intended to bar the admission of only those co-defendant statements that clearly identify the complaining defendant as a participant in the crime and are thus too "powerful" for a jury to ignore. By applying *Bruton* to statements that, as redacted, do not even mention the complaining defendant, the court of appeals overlooked the fact that *Bruton* was an exception to the rule that juries can be trusted to follow the trial court's instructions—a rule that has been termed "the premise upon which the system of jury trials functions under the American judicial system" (*Parker* v. *Randolph*, 442 U.S. 62, 75 n.7 (1979)). Moreover, a broad construction of *Bruton*, if routinely applied, would require dramatic revisions in the structure of pre-trial discovery, reduce the number of admissible confessions, and provoke substantial inefficiencies in the conduct of criminal trials—all without promoting any genuine interest of defendants that could not be equally well-served by appropriate limiting instructions to the jury.

ARGUMENT

BRUTON DOES NOT APPLY TO A CO-DEFENDANT'S STATEMENT THAT DOES NOT NAME OR OTHERWISE IDENTIFY THE COMPLAINING DEFENDANT AS A PARTICIPANT IN THE CRIME

A. Juries Ordinarily Can Be Trusted To Follow The Trial Court's Instructions

Our system of jury trials embraces a strong presumption that jurors can and will follow the trial court's instructions. Time and again, this Court has refused to engage in the "unfounded speculation that * * * jurors disregarded clear instructions of the court in arriving at their verdict" (*Opper* v. *United States*, 348 U.S. 84, 95 (1954)). To do so, the Court has noted, would violate "[o]ur theory of trial," which "relies upon the ability of a jury to follow instructions" (*ibid.*).

Applying this fundamental premise, the Court has held, for example, that a defendant's rights were not abridged by the admission, during the guilt phase of a trial, of a prior conviction that was admissible solely for sentencing purposes (*Spencer* v. *Texas*, 385 U.S. 554 (1967)). To say that limiting instructions are constitutionally inadequate to protect against the possible prejudicial effects of such evidence, the Court held, "would make inroads into th[e] entire complex code of state criminal evidentiary law, and would threaten other large areas of trial jurisprudence" (*id.* at 562). The Court refused to take such a step, holding that "the jury is expected to follow instructions in limiting this evidence to its proper function" (*ibid.*).

More recently, in *Marshall* v. *Lonberger*, 459 U.S. 422 (1983), the Court reaffirmed *Spencer*, holding that the Constitution does not forbid the admission, at the guilt phase of trial, of a prior conviction that was admissible only to show that the defendant deserved the death penalty. In so holding, the Court expressly noted that "the trial

judge gave a careful and sound instruction requiring the jury to consider respondent's prior conviction only for [sentencing] purposes" (459 U.S. at 438-439 n.6).

The Court has affirmed the basic premise of jury competence in rejecting the "dubious" and "speculative assumption[]" that jurors would use a defendant's silence at trial against him, despite instructions not to do so (*Lakeside* v. *Oregon*, 435 U.S. 333, 340 (1978));[5] in refusing to find that nine jurors would ignore an instruction to find guilt beyond a reasonable doubt simply because three jurors voted for acquittal (*Johnson* v. *Louisiana*, 406 U.S. 356, 360-361 (1972)); and in applying a harmless error analysis to misjoinder under Fed. R. Crim. P. 8, in part because the Court would not " 'necessarily assume that the jury misunderstood or disobeyed' " the instructions of the trial judge to consider the evidence against each defendant separately (*United States* v. *Lane*, No. 84-744 (Jan. 27, 1986), slip op. 12 n.13, quoting *Blumenthal* v. *United States*, 332 U.S. 539, 553 (1947)).

Prior to *Bruton*, this Court only once expressly departed from the premise that juries are capable of following instructions to consider evidence for one purpose but not for another.[6] In *Jackson* v. *Denno*, 378 U.S. 368 (1964), the

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[5] The Court observed in *Lakeside* that " '[W]e have not yet attained that certitude about the human mind which would justify us in . . . a dogmatic assumption that jurors, if properly admonished, neither could nor would heed the instructions of the trial court' " (435 U.S. at 340 n.11, quoting *Bruno* v. *United States*, 308 U.S. 287, 294 (1939)).

[6] *Burgett* v. *Texas*, 389 U.S. 109 (1967), which is sometimes cited as indicating this Court's distrust of limiting instructions, did not involve a limiting instruction at all. Instead, it involved a curative instruction, directing the jury to ignore altogether certain highly prejudicial evidence that was not admissible for any purpose. In *Burgett*, the prosecution offered evidence of the defendant's prior convictions, at least one of which had been obtained while the defendant was not represented by counsel. The Court held that the admission of the uncounseled conviction was "inherently prejudicial" to the defendant, in

Court held unconstitutional a New York rule that required trial judges to submit to the jury the issue of the voluntariness of a defendant's confession; under that system, the jury was instructed to consider the confession against the defendant only if it first concluded that the confession had been given voluntarily. To make these judgments—to evaluate both the voluntariness and weight of a confession—required the jury to consider, at once, "both the evidence going to voluntariness and all of the corroborating evidence showing that the confession is true and that the defendant committed the crime" (378 U.S. at 381). The Court concluded that an instruction to the jury to ignore a confession once it found the confession to be involuntary was simply too difficult to obey (*id.* at 388):

> Under the New York procedure, the fact of a defendant's confession is solidly implanted in the jury's mind, for it has not only heard the confession, but it has been instructed to consider and judge its voluntariness and is in a position to assess whether it is true

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light of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (*Burgett*, 389 U.S. at 115), and that curative instructions from the trial court could not repair the damage. Subsequent decisions of this Court have reiterated that the central premise of *Burgett* was that " '[t]o permit a conviction obtained in violation of *Gideon* v. *Wainwright* to be used against a person either to support guilt or enhance punishment for another offense * * * is to erode the principle of that case' " (*United States* v. *Tucker*, 404 U.S. 443, 449 (1972) (quoting *Burgett*, 389 U.S. at 115)). Accord, *Loper* v. *Beto*, 405 U.S. 473 (1972).

To the extent that *Burgett* was viewed as undermining the validity of limiting instructions regarding prior convictions, the Court dispelled that notion in *Marshall* v. *Lonberger*, 459 U.S. at 438-439 n.6, where the Court upheld an instruction requiring the jury to consider the defendant's prior conviction only for purposes of sentencing and not on the issue of guilt. In light of *Marshall*, *Burgett* is best understood as its terms suggest: as a decision intended to enforce *Gideon*, and not as an exception to the general premise that juries can, and do, follow instructions.

> or false. If it finds the confession involuntary, does the jury—indeed, can it—then disregard the confession in accordance with its instructions?

Because a jury might find it peculiarly "difficult to understand the policy forbidding reliance upon a coerced, but true, confession" (*id.* at 382), the Court held that instructions alone would not suffice; even a well-instructed jury could not decide the voluntariness issue and then assess the weight to be given to the defendant's confession (*id.* at 391 & n.19).

But the Court did not intend for *Jackson* to carve a broad exception from the premise of jury competence. The Court made that point clear in *Watkins* v. *Sowders*, 449 U.S. 341 (1981), a case decided 13 years after *Bruton*. There, the defendants were convicted largely on the strength of the testimony of their victims, who identified the defendants at trial. The defendants contended that the identification testimony was tainted by unduly suggestive pretrial procedures. Relying on *Jackson*, the defendants claimed that instructions alone could not ensure that the jury would cast from its mind the unreliable identification testimony; accordingly, they argued, under *Jackson* the trial court should have decided the admissibility of the identification testimony before submitting it to the jury. This Court rejected that contention. *Jackson*, the Court held, was an unusual case; it did not announce a broad exception to the basic premise that juries can follow instructions. Instead, the Court observed, *Jackson* was based on the "peculiar problems" presented by the issue of the voluntariness of a confession—in particular, the difficulty a jury might have in understanding " 'the policy forbidding reliance upon a coerced, but true, confession.' " *Watkins*, 449 U.S. at 347 (quoting *Jackson*, 378 U.S. at 382). With regard to identification testimony, the Court held, the "peculiar problems" presented in *Jackson* were inapplicable. Therefore, held the Court, although "[a] judicial determination outside the presence of the jury of

the admissibility of identification evidence may often be advisable" (*Watkins*, 449 U.S. at 349), the Constitution does not require a categorical "departure from the presumption that juries will follow instructions" (*id.* at 347). Appropriate jury instructions should ordinarily ensure sufficient fairness to the defendant, the Court concluded, even though, of course, unreliable identification testimony may be "powerfully incriminating" to a defendant (see *id.* at 352 (Brennan, J., dissenting)).[7]

B. *Bruton* Established Only A Narrow Exception To The Presumption That Juries Can Follow Limiting Instructions

Like the decision in *Jackson,* this Court's decision in *Bruton* v. *United States,* 391 U.S. 123 (1968), was intended to carve only a narrow exception from the premise that juries can and will follow limiting instructions. The exception in the case of *Bruton* was designed to cover only those "powerfully incriminating" statements of a nontestifying co-defendant that clearly identify the complaining defendant as a participant in the crime.

The facts of *Bruton* underscore the limited reach of its holding. Bruton and his co-defendant Evans were tried jointly for armed postal robbery. At trial the government offered against Evans two oral confessions he had made, one of which expressly named Bruton as an accomplice in the crime. Evans did not testify at trial. Because Evans'

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[7] Following this Court's lead, the lower federal courts have routinely relied on jury instructions to protect defendants against prejudice from evidence admitted only against another defendant. See, *e.g.*, *United States* v. *Porter,* 764 F.2d 1, 13 (1st Cir. 1985); *United States* v. *Moon,* 718 F.2d 1210, 1232 (2d Cir. 1983), cert. denied, 466 U.S. 971 (1984); *United States* v. *Hines,* 717 F.2d 1481, 1489 (4th Cir. 1983), certs. denied, 467 U.S. 1214 and 1219 (1984); *United States* v. *Reed,* 639 F.2d 896, 907 (2d Cir. 1981); *United States* v. *Davis,* 546 F.2d 617, 620 (5th Cir. 1977); *United States* v. *Pate,* 543 F.2d 1148, 1149 (5th Cir. 1976). See also *United States* v. *Barbieri*, 614 F.2d 715, 720 (10th Cir. 1980).

confessions were concededly hearsay as to Bruton, the trial court instructed the jury that while it could consider the confessions against Evans, those statements were "inadmissible * * * against [Bruton] and therefore had to be disregarded in determining [Bruton's] guilt or innocence" (*Bruton,* 391 U.S. at 125). Both defendants were convicted; on review, this Court reversed. Jury instructions, the Court held, are not always sufficient: "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored" (*id.* at 135). "Such a context," the Court decided, "is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect * * * . The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination." *Id.* at 135-136.

By its own terms, *Bruton* was a narrow departure from the ordinary presumption that juries are competent to follow instructions. The Court "agree[d] that there are many circumstances in which * * * reliance [on jury instructions] is justified. Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions" (391 U.S. at 135). But the *Bruton* case was different: there, the "substantial, perhaps even critical" impact of Evans' "powerfully incriminating extrajudicial statements" (*id.* at 128, 135) posed a "substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining [Bruton's] guilt" (*id.* at 126).

The Court employed the phrase "powerfully incriminating" advisedly. As Justice Rehnquist wrote in *Parker* v. *Randolph,* 442 U.S. at 73 (plurality opinion): "[t]he Confrontation Clause has never been held to bar the admission into evidence of every relevant extrajudicial statement made by a nontestifying declarant simply because it in some way incriminates the defendant." Evans' statement was particularly memorable: it expressly and unambiguously named Bruton as an accomplice in the robbery (*Bruton,* 391 U.S. at 124). In that respect, the admission of Evans' confession was almost as damaging as a confession from Bruton himself—"the most probative and damaging evidence that c[ould] be admitted against him" (*id.* at 139) (White, J., dissenting).

In delineating the "contexts in which the risk that the jury will not, or cannot, follow instructions is * * * great" (391 U.S. at 135), the Court in *Bruton* relied heavily on its prior decision in *Jackson*—itself a deliberately narrow exception to the presumpton of jury competence. By resting its analysis on *Jackson,* the Court made clear that "powerfully incriminating" refers to those co-defendant statements that are, in substance, like confessions of the defendant himself. It is those statements—and only those statements, we suggest—that limiting instructions may not be able to dislodge from a jury's attention.

This conclusion is buttressed by the *Bruton* Court's reliance on *Douglas* v. *Alabama,* 380 U.S. 415 (1965) (see *Bruton,* 391 U.S. at 126-127). There, the Court held that a defendant's Confrontation Clause rights had been violated when his co-defendant's confession was read aloud to the jury under the guise of cross-examining the co-defendant at trial. Because the co-defendant had asserted his Fifth Amendment rights and refused to testify, Douglas was unable to challenge the truthfulness of the confession. In holding that the use of the co-defendant's confession in this manner violated Douglas' rights, the Court noted that

"of crucial importance" was the fact that the confession "named [Douglas] as the person who fired the shotgun blast which wounded the victim" (*Douglas,* 380 U.S. at 417).

The Court's reliance on *Jackson* and *Douglas* confirms that it intended *Bruton* to apply only to those co-defendant statements that clearly identify the complaining defendant as a participant in the crime. Consistent with that narrow intent, the Court has steadfastly refused to cut *Bruton* loose from its moorings, and has noted that the decision must be "tied to the situation in which it arose" (*Parker,* 442 U.S. at 75 n.7 (plurality opinion)). The year after *Bruton* was decided, for example, the Court refused to extend it to cover a prosecutor's use of a co-defendant's confession in an opening statement (*Frazier* v. *Cupp,* 394 U.S. 731 (1969)). Two years later, in *Nelson* v. *O'Neil,* 402 U.S. 622 (1971), the Court held that limiting instructions were sufficient, notwithstanding *Bruton*, where the confession admitted against the co-defendant implicated the complaining defendant as a confederate, but the co-defendant testified at trial and renounced the confession as false. See also *Schneble* v. *Florida,* 405 U.S. 427 (1972) (statements alleged to have been admitted in violation of *Bruton* held to be harmless); and *Tennessee* v. *Street,* No. 83-2143 (May 13, 1985) (jury instructions were sufficient where co-defendant's confession incriminating the defendant was admitted only as rebuttal evidence).

These cases reflect this Court's unwillingness to assume that juries will not ordinarily follow a trial court's instructions, even when a co-defendant's confession is the subject of the limiting instructions. Indeed, in one of the Court's most recent considerations of *Bruton*, the four-justice plurality made precisely that point. In *Parker* v. *Randolph,* 442 U.S. at 72, the plurality opinion stated that *Bruton* does not apply to cases involving so-called "interlocking confessions." The plurality characterized

Bruton as a limited exception to the fundamental general rule that juries can be trusted to follow a trial court's instructions (442 U.S. at 75 n.7). The *Bruton* exception was created, the plurality opinion explained, "because of the 'devastating' consequences that failure of the jury to disregard a codefendant's inculpatory confession could have to a nonconfessing defendant's case" (*ibid.*). Where the impact of the co-defendant's confession is not as "devastating" as it was in *Bruton*, there is no reason "to require departure from the general rule allowing admission of evidence with limiting instructions" (*id.* at 74-75 (footnote omitted)).[8]

Bruton was thus intended to strike a balance: on the one hand, it recognized that jury instructions will ordinarily protect defendants from the impact of hearsay or other evidence inadmissible against them; on the other hand, it concluded that there may be some co-defendant confessions that are so damaging—in that they clearly identify the complaining defendant as a confederate—that even well-instructed juries may be unable properly to segregate

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[8] The plurality opinion in *Parker* casts some doubt on the continued vitality of *Bruton* altogether. The plurality quoted, with apparent approval, from the pre-*Bruton* decision in *Opper* v. *United States*, 348 U.S. 84 (1954); *Opper* was cited as an instance in which "an instruction directing the jury to consider a codefendant's extrajudicial statement only against its source has been found sufficient to avoid offending the confrontation right of the implicated defendant" (*Parker*, 442 U.S. at 73-74). Significantly, in *Opper* the co-defendant had apparently implicated the complaining defendant quite directly (see *Opper* v. *United States*, 211 F.2d 719, 722-723 (6th Cir. 1954)); the reliance on *Opper* thus may reflect some reluctance to retain even the narrow exception formulated in *Bruton* to the premise that juries can follow instructions. The underpinnings of *Bruton* were again eroded in *Watkins*, which held that instructions were sufficient to protect a defendant from a jury's use against him of unreliable identification testimony—surely as "powerfully incriminating" to a defendant as a co-defendant's confession (see *Watkins*, 449 U.S. at 356 (Brennan, J., dissenting)).

them in their deliberations. To read *Bruton* more broadly upsets this balance of values, by giving too little weight to the fundamental premise of jury competence.

C. A Narrow Construction of *Bruton* Best Serves To Balance The Interests Of Defendants And The Needs Of The Criminal Justice System

The construction of *Bruton* that we urge comports with the balance of interests identified in *Bruton*. It protects a defendant from the impact of a confession that, by naming him or otherwise clearly identifying him as a confederate, is particularly difficult for even a well-instructed jury to ignore. At the same time, however, this construction does not bar the admission in a joint trial of a confession that can only be incriminating to the complaining defendant if the jury considers it in the context of all the other evidence in the case. The inculpatory impact of such a confession is obviously attenuated; as a result, it is more easily set aside in the jury's evaluation of the evidence against the complaining defendant.[9] In light of this

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[9] Of course, reversal might be required if the prosecutor undermined the effect of the limiting instructions by expressly relying on the co-defendant's confession in arguing the defendant's case to the jury, or even by suggesting that the jury should make the connection between the confession and the evidence against the defendant. See, *e.g.*, *United States* v. *Gonzalez*, 555 F.2d 308, 316-317 (2d Cir. 1977) (prosecutor made repeated use of co-defendant's post-arrest statement in summing up the case against defendant); *United States ex rel. Mascia* v. *Zelker*, 450 F.2d 166, 168 (2d Cir. 1971), cert. denied, 406 U.S. 959 (1972) (prosecutor repeatedly sought to connect defendant with a car mentioned in co-defendant's confession).

In this case, contrary to the suggestion of the court of appeals, the prosecutor made no such argument to the jury. The prosecutor did no more than characterize as contrived respondent's claim, on direct examination, that she had heard no conversation in the car en route to Ms. Scott's house (Pet. App. 23a-24a; Tr. 452). Not once did the prosecutor urge the jury to consider Williams' confession against respondent; in fact, he did not even mention the statement in reviewing the

balance of competing interests, it is not surprising that every court of appeals that has addressed the issue—except for the court below— has limited *Bruton* to co-defendant statements that name or otherwise clearly identify the complaining defendant as a participant in the crime.[10]

Any broader reading of *Bruton*—particularly one that requires a trial court to evaluate the confession in light of all the other evidence at trial—would substantially alter pretrial proceedings and the conduct of criminal trials. First, in order to determine whether a particular statement is sufficiently inculpatory, the prosecution would have to divulge, in advance of trial, all the co-defendant statements it intended to use at trial as well as the balance of its anticipated proof, in order that the full evidentiary "context" might be available for defense counsel and the

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evidence against her. To the contrary, the prosecutor expressly reminded the jury that it "would be unfair" to consider Williams' confession against respondent (*id.* at 23a; Tr. 448), an injunction that the trial court reiterated in its final instructions to the jury (Jury Charge Tr. 10). Thus, this is not a case in which the prosecutor, in arguing the defendant's guilt, invited the jury to consider the co-defendant's confession. Compare *Lee* v. *Illinois,* No. 84-6807 (June 3, 1986), slip op. 7 n.3.

[10] See, *e.g., United States ex rel. Cole* v. *Lane,* 752 F.2d 1210, 1216-1217 (7th Cir. 1985); *United States* v. *Satterfield,* 743 F.2d 827, 849 (11th Cir. 1984), cert. denied, No. 84-5941 (May 20, 1985); *United States* v. *Webster,* 734 F.2d 1048, 1054 n.6 (5th Cir.), cert. denied, 469 U.S. 1073 (1984); *United States* v. *Slocum,* 695 F.2d 650, 655 (2d Cir. 1982), cert. denied, 460 U.S. 1015 (1983); *United States* v. *Tavelman,* 650 F.2d 1133, 1139 (9th Cir. 1981), cert. denied, 455 U.S. 939 (1982); *United States* v. *DiGregorio,* 605 F.2d 1184, 1190 (1st Cir.), cert. denied, 444 U.S. 937 (1979); *United States* v. *Belle,* 593 F.2d 487, 493-494 (3d Cir.) (en banc), cert. denied, 442 U.S. 911 (1979). Indeed, until this case, one would have supposed that the Sixth Circuit took the same view. In *United States* v. *Dady,* 536 F.2d 675 (6th Cir. 1976), for example, the court of appeals had refused to apply *Bruton* in a case virtually indistinguishable from this one. See also *Lyle* v. *Koehler,* 720 F.2d 426, 431 n.6 (6th Cir. 1983).

trial court to evaluate. That would impose on the prosecution a discovery obligation going far beyond what is typically required in the federal system and in many states. Surely *Bruton* never contemplated such "an astonishing result" (*United States* v. *Belle*, 593 F.2d at 496).

Moreover, to effectuate this broad reading of *Bruton*, trial courts could not simply rely on a pretrial review of the government's case; in order to appreciate the full evidentiary "context" of the co-defendant's confession, courts would also have to examine the evidence that the defense intended to offer. In this case, for example, it was testimony furnished by respondent herself that persuaded the court of appeals that the co-defendant's confession was "powerfully incriminating."

The implications of such a procedure are forbidding. For one thing, discovery of defense evidence is typically quite limited. See, *e.g.*, Fed. R. Crim. P. 16(b)(2). Moreover, it is likely that even if courts required the defendant to disclose his anticipated proof in advance, at least in camera, they would be reluctant to hold the defendant to his proffer. If they did not, it would be impossible to know, at the time a co-defendant statement was offered, whether unforeseen evidence that might be offered by the defense would later make that statement "powerfully incriminating." Thus, if the "linkage" between the co-defendant's confession and the evidence at trial could be established by the defense evidence, as the court of appeals held in this case, a court would not be able to determine whether a severance was required until late in the trial. What is worse, the "linkage" determination—and thus the requirement of a severance under *Bruton*—would be subject to mid-trial manipulation by the defense. By adjusting his own testimony, or through the careful crafting of his proffer, a defendant would be able to make the co-defendant's confession appear to be potentially damaging and thereby force the trial court to sever the joint trial and

proceed against the defendant alone. The uncertainties that characterize the rule adopted by the court below would make it impossible for courts to determine, in advance of trial, whether a single trial was appropriate, or whether the impact of a non-testifying co-defendant's statement would be so powerfully incriminating that the complaining defendant must be granted a separate trial.

Even in cases in which the court could assess the inculpatory impact of a co-defendant's confession in advance, the lower court's rule would have substantial costs. Once a co-defendant's confession was shown, in context, to have a sufficiently "inculpatory impact," the government would then have two choices: either to refrain from offering the confession even against the confessing defendant, or to agree to sever the trial of each defendant who may be implicated by the statement. The costs of forcing the prosecution to choose between these options, we submit, far outweigh the benefits to the defendant. To abandon the use of confession evidence is obviously undesirable; this Court has made it clear that confessions "are more than merely 'desirable'; they are essential to society's compelling interest in finding, convicting and punishing those who violate the law" (*Moran* v. *Burbine*, No. 84-1485 (Mar. 10, 1986), slip op. 12 (citation omitted)). See also *Oregon* v. *Elstad*, No. 83-773 (Mar. 4, 1985), slip op. 6; *United States* v. *Washington*, 431 U.S. 181, 186-187 (1977); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225 (1973). By the same token, it is equally undesirable to grant severances to each and every defendant who is in any way affected by the inculpatory statement. Such a policy would promote enormous inefficiencies: the same evidence would be retread again and again in separate proceedings, wasting both judicial and prosecutorial resources. As this Court noted recently, "joint trials 'conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in

bringing those accused of crime to trial' " (*United States* v. *Lane,* No. 84-744 (Jan. 27, 1986), slip op. 10 (quoting *Bruton,* 391 U.S. at 134)). Severances also increase the opportunities for inconsistent verdicts among similarly situated defendants—a plainly "discomforting" result (*Standefer* v. *United States,* 447 U.S. 10, 25 (1980)). These disadvantages, moreover, would be everyday occurrences, in light of the increasing frequency of multi-defendant prosecutions.

Nothing in *Bruton* or the policy underlying it requires that the criminal justice system absorb such significant costs on a regular basis. The Court in *Bruton* isolated a narrow category of co-defendant statements that a jury, even with limiting instructions, might not be entrusted to ignore in its deliberations. That category—co-defendant confessions that clearly identify the complaining defendant as a participant in the crime—is well-defined and can be applied easily by prosecutors and trial courts. To expand the category of "powerfully incriminating" statements to include those that, as redacted, do not even refer to the complaining defendant would give *Bruton* a meaning this Court never intended it to have. In addition, it would ignore the central premise of our system of jury trials: that, except in rare cases, juries can, and do, follow the instructions of trial courts.

CONCLUSION

The judgment of the United States Court of Appeals should be reversed.

Respectfully submitted.

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